



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2005

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2005-03056

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220655.

The Texas Department of Transportation (the "department") received a request for copies of all proposals submitted for the Trans Texas Corridor project that will parallel IH 35. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state that portions of the requested information may contain proprietary information subject to exception under the Public Information Act (the "Act"). Pursuant to section 552.305(d) of the Government Code, you have notified the interested third parties, Trans-Texas Express, LLC ("Trans-Texas"), Fluor Enterprises, Inc. ("Fluor"), and Cintra Concesiones de Infraestructuras de Transporte, SA ("Cintra") of the request and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Gov't Code § 552.101. You assert that the submitted information is confidential under section 361.3023 of the Transportation Code, which provides:

(a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

Transp. Code § 361.3023. Section 361.3022(b)(1) and (2) state:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits; [and]

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

Transp. Code § 361.3022(b)(1), (2). Section 361.302 of the Transportation Code defines a "comprehensive development agreement" as "an agreement that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project." Transp. Code § 361.302. You state that the submitted information consists of proposals regarding a comprehensive development agreement, and you further inform us that at the time of receiving this request the department had not yet entered into a final contract regarding this agreement. Based on our review of your arguments and the submitted information, we conclude that, to the extent the submitted information does not come within subsections 361.3022(b)(1) and (2), it is

confidential under section 361.3023 of the Transportation Code and must be withheld under section 552.101 of the Government Code.¹

To the extent the submitted information comes within subsections 361.3022(b)(1) and (2), it is not confidential under section 361.3023 of the Transportation Code and may not be withheld under section 552.101. We will, however, consider whether such information involves protected third party interests.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Trans-Texas has not submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of the information at issue pertaining to Trans-Texas constitutes proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We turn now to the arguments submitted by Cintra and Fluor. Both companies raise section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it

¹ We note, however, that since the time of receiving this request the department has entered into a final contract regarding this comprehensive development agreement. Accordingly, section 361.3023 of the Transportation Code may not apply to future requests received by the department regarding this information.

relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its competitors];
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing,

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*

Upon review of both Cintra's and Fluor's arguments and the remaining information at issue, we determine that neither Cintra nor Fluor has demonstrated that any portion of the information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for any of this information. We therefore determine that no portion of the remaining information is excepted from disclosure under section 552.110(a). We find, however, that both Cintra and Fluor have made a specific factual or evidentiary showing that the release of a portion of the information at issue, which we have marked, would cause their companies substantial competitive harm. Thus, this marked information must be withheld pursuant to section 552.110(b). We conclude, however, that both Cintra and Fluor have failed to demonstrate that any other portion of the information at issue constitutes commercial or financial information, the release of which would cause their companies substantial competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, pursuant to section 552.110, the department must withhold only those portions of the information at issue that we have marked.

In summary, to the extent the submitted information does not come within subsections 361.3022(b)(1) and (2) of the Transportation Code, it is confidential under section 361.3023 of the Transportation Code and must be withheld under section 552.101 of the Government Code. To the extent the submitted information comes within subsections 361.3022(b)(1) and (2) of the Transportation Code, the department must withhold the information that we have marked pursuant to section 552.110 of the Government Code. The remaining information is not confidential and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

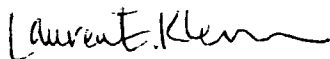
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 220655

Enc. Submitted documents

c: Mr. Patrick Driscoll
San Antonio Express-News
P.O. Box 2171
San Antonio, Texas 78297-2171
(w/o enclosures)

Mr. Diego Marin
Cintra
Pza. Manuel Gomez Moreno, 2
Edificio Alredo Mahou
E-28020 Madrid
(w/o enclosures)

Mr. Pat Flaherty
Fluor Enterprises, Inc.
8108 Mesa Drive, Suite C101
Austin, Texas 78759
(w/o enclosures)

Mr. Phil Armstrong
Trans Texas Express, LLC
1820 Regal Row, Suite 250
Dallas, Texas 75235
(w/o enclosures)

Mr. Richard A. Fierce
Assistant General Counsel
Fluor Corporation
100 Fluor Daniel Drive
Greenville, South Carolina 29607-2762
(w/o enclosures)

Mr. Christopher B. Gilbert
Bracewell & Patterson, LLP
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
(w/o enclosures)